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No. 85-1265

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1985

THE PEOPLE OF THE STATE OF MICHIGAN
Petitioner

vs.

ASKIA KHALIL SHABAZ
Respondent

ON WRIT OF CERTIORARI
TO THE MICHIGAN SUPREME COURT

BRIEF FOR PETITIONER

WAYNE COUNTY PROSECUTOR'S OFFICE

TIMOTHY A. BAUGHMAN* P24381
Chief of the Criminal Division
Research, Training and Appeals
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: 224-5792

ANDREA L. SOLAK P25217
Principal Attorney, Appeals
Phone: (313) 224-5794

* Counsel of Record

QUESTIONS PRESENTED FOR REVIEW

I.

IS THE FOURTH AMENDMENT IMPLICATED WHEN THE POLICE SIMPLY UNDERTAKE TO RUN AFTER AN INDIVIDUAL, WHO HAS RUN AT THE SIGHT OF THEM, WITHOUT ANY ACTUAL RESTRAINT ON THE FREEDOM OF MOVEMENT OF THAT INDIVIDUAL BY PHYSICAL FORCE OR SHOW OF AUTHORITY, SO THAT A WEAPON THROWN TO THE GROUND BY THE INDIVIDUAL DURING HIS FLIGHT CANNOT BE CONSIDERED ABANDONED?

II.

ASSUMING ARGUENDO THAT THE PURSUIT OF AN INDIVIDUAL BY AN UNDERCOVER OFFICER, WITHOUT MORE, CONSTITUTES A SEIZURE, INDEPENDENT OF AN ACTUAL PHYSICAL RESTRAINT, DID THE FLIGHT OF THE RESPONDENT AFTER LEAVING A BUILDING AT WHICH NARCOTIC AND WEAPONS OFFENSE ARRESTS HAD PREVIOUSLY BEEN MADE, AND AFTER ATTEMPTING TO HIDE A PAPER BAG IN HIS VEST OR PANTS UPON THE OBSERVATION OF AN UNMARKED POLICE CAR, CONSTITUTE REASONABLE SUSPICION FOR AN INVESTIGATIVE DETENTION?

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The opinion of the Michigan Court of Appeals is unreported and is appended as Appendix A to the Petition for a Writ of Certiorari. The Opinion of the Michigan Supreme Court is reported at 424 Mich 42 (1985).

STATEMENT OF JURISDICTION

The judgment of the Michigan Court of Appeals was entered on August 12, 1983. The judgment of the Michigan Supreme Court was entered on December 4, 1985. The jurisdiction of this Court is invoked under 28 USC Sec 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath

> or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The respondent was charged with Carrying a Concealed Weapon, contrary to MCL 750.227; MSA 28.424. A preliminary examination was held in the 36th District Court of the City of Detroit, before the Honorable Louis F. Simmons, Jr., on July 22, 1982, and the respondent was bound over for trial.

A motion to quash the information or in the alternative to conduct an evidentiary hearing to suppress the evidence was filed and a hearing pursuant thereto was conducted on October 8, 1982, before the Honorable Michael F. Sapala, Judge of the Recorder's Court.

Testimony was adduced at the evidentiary hearing from Police Officer Kenneth Surma. The officer testified to having been on an auto patrol with his partners in the area of Woodward and Clairmont in the City of Detroit, on July 22, 1982 at approximately 9:15 p.m. The

officers were in plain clothes and in an unmarked patrol car (J.A. 6,28). The vehicle was described as an "unmarked standard police detective car" (J.A. 12). The officer identified the respondent as a man seen leaving an address of 60 Clairmont, an apartment building. The officer testified that at the intersection of Woodward and Clairmont, there had been a lot of narcotics and concealed weapons arrests, as well as prostitution related crimes. "John's getting ripped off." (J.A. 9,10,46).

The officer specified 60 Clairmont as an address wherein these problems had taken place (J.A. 9,46). The officer and his partner had made five or six Carrying a Concealed Weapons arrests and ten narcotics arrests at the address (J.A. 10). The officer had been working in this area for approximately eleven years (J.A. 8,45).

The respondent exited 60 Clairmont and

began to walk eastbound on Clairmont. The patrol car was proceeding westbound on Clairmont (J.A. 6-7). At the point that the officers first observed the respondent they were approximately 50 feet or so from him (J.A. 29).

As the respondent was walking towards Woodward, he looked in the direction of the patrol car and began stuffing a paper bag under his vest (J.A. 7,12). The bag was described as a small size lunch bag (J.A. 32). The respondent was not wearing an outer coat (J.A. 31). The respondent walked to a point where he and the car would pass, and as the car began to slow down, the respondent began running (J.A. 33-34). The car had slowed down to take a better look at what the respondent was doing (J.A. 12). The officer got out of the passenger side of the automobile as it stopped and followed the respondent onto Woodward Avenue (J.A. 13). The officer acknowledged at this

point no felony reports against the respondent had been received, nor did he observe any weapons or contraband (J.A. 34,39).

The respondent was running approximately 10 to 15 feet ahead of the police officer (J.A. 35). The respondent ran to Woodward Avenue, turned right, which would have been in a southbound direction, and continued to run past two or three different store fronts (J.A. 36). The officer did not call out "halt", or any other such command (J.A. 35,41).

The respondent ran into one of several doorways along a storefront which led into a vestibule and stairway (J.A. 37). At this point the officer was approximately 5 to 10 feet away from the respondent and the respondent turned and tried to come back through the doorway past the officer (J.A. 37). The officer grabbed the respondent and pushed him

towards his partner who had just gotten there (J.A. 14,37). The officer did not draw his service revolver; although, at the time the respondent ran back through the vestibule, his partner had arrived with his service revolver pulled (J.A. 15). The respondent collided with him and the gun discharged, but no one was struck.

The officer then went into the vestibule doorway and retrieved the bag which was thrown by an open interior door within the vestibule (J.A. 14). The bag was a brown paper bag which was closed (J.A. 42). The officer confiscated the .357 Magnum from the bag, and unloaded it (J.A. 8). The officer acknowledged that when he grabbed the respondent he did not have any additional information or sighting that the respondent had committed a felony or was about to commit a felony (J.A. 34). The officer acknowledged that while the respondent

was running he did not see anything in his hands (J.A. 34).

The officer testified that all the time he was pursuing the respondent up to the point that he followed him into the vestibule, the officer did not yell out nor identify himself as a police officer. He did not at any time yell, "stop in the name of the law" or "stop, I'm a police officer." (J.A. 41). The officer testified that he had been in the building at 60 Clairmont many times and that it contained approximately thirty apartments (J.A. 42).

The officer testified that he had been a police officer for approximately eleven years. It was his belief that at the time that he saw the respondent putting the bag under his vest that he was hiding something, either a weapon or narcotics (J.A. 45). The officer testified that he had not seen the respondent before (J.A. 47). The officer acknowledged that

across the street or very near to the apartment house was a supermarket (J.A. 47). The officer clarified that the respondent started running just as the car passed him and it was about to stop (J.A. 48).

At the preliminary examination, the petitioner argued that the police had a reasonable suspicion to stop the respondent; however, before he was stopped the respondent discarded the bag; thus, there was no search or seizure (J.A. 18).

The petitioner argued that based on the circumstances as well as the high crime area, the officer's conduct was reasonable. In ruling, the trial court credited the officer as a totally credible person for whom he had no reason to question his veracity (J.A. 51). The court also noted the case of People v Terrell, 77 Mich App 676 (1977) and believed that Terrell was the existing

law and that he was governed thereby (J.A. 51). The court granted the motion to suppress and dismiss the case with a personal note that it was the court's personal belief that it was an unfortunate result (J.A. 54-55).

The Michigan Court of Appeals and the Michigan Supreme Court affirmed the dismissal.

SUMMARY OF ARGUMENT

The Michigan Supreme Court upheld a trial court dismissal of a possession of a concealed weapons charge, finding that the totality of circumstances did not provide the particularized suspicion that criminal activity was afoot so as to justify the temporary detention of the respondent, thus violating the respondent's privacy rights under the Fourth Amendment. The dissenting justices found as a matter of law that the act of running after another did not constitute a detention for investigation; thus the conduct did not constitute a seizure under the Fourth Amendment. Assuming the conduct did constitute a seizure, the dissenting justices further found that there existed reasonable suspicion to justify the seizure of the respondent and the plain view seizure of the evidence.

Petitioner contends that a "seizure" of the person occurs under the Fourth Amendment when 1) an individual, who is innocent of any crime, would believe, due to an exercise of official authority or a show of force, that he is not free to go on his way with impunity and acquiesces to the exercise of official authority or show of force, or 2) an individual is actually physically restrained by the exercise of physical force.

The facts in this case demonstrate that there was no exercise of official authority or physical force by the police officers who simply ran after an individual who ran at the sight of them. The officers were in plain clothes, in an unmarked standard police vehicle. No questions or commands were issued by the officers, nor did they have the opportunity to provide the respondent with any identification. The police, by their conduct, did not cause any

restraint of the respondent's freedom of movement.

Petitioner also submits that the Michigan Supreme Court erred in finding that the act of abandonment was in direct response to an anticipated unjustified seizure. Petitioner contends that the respondent, through his conduct of discarding the evidence to the ground, relinquished any expectation of privacy. An individual may only assert a Fourth Amendment right if seized and searched.

Assuming that the conduct of the officers constitutes a seizure such that some level of cause is necessary to justify the pursuit, petitioner submits that there exists sufficient articulable facts to constitute reasonable suspicion and justify the temporary detention.

ARGUMENT ONE

THE FOURTH AMENDMENT IS NOT IMPLICATED WHEN THE POLICE SIMPLY UNDERTAKE TO RUN AFTER AN INDIVIDUAL, WHO HAS RUN AT THE SIGHT OF THEM, WITHOUT ANY ACTUAL RESTRAINT ON THE FREEDOM OF MOVEMENT OF THAT INDIVIDUAL BY PHYSICAL FORCE OR SHOW OF AUTHORITY, SO THAT A WEAPON THROWN TO THE GROUND BY THE INDIVIDUAL DURING HIS FLIGHT MUST BE CONSIDERED ABANDONED.

A. Introduction: The Analytical Framework

In undertaking an analysis of constitutional questions, it is always wise to keep the text of the constitutional provision involved firmly in mind, to the end that one avoids engaging only in an interpretation of a previous analysis, which itself expressed a particular point of view, rather than an analysis of the constitution, with a result that may have little relation to the actual language of the constitution itself. Involved in this case is a seizure question. The Fourth Amendment provides in relevant

part that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated. ...

The Fourth Amendment's requirement that a search and/or seizure be reasonable, that it be grounded on some objective justification, governs all seizures of the person, "including seizures that involve only a brief detention short of traditional arrest". Davis v Mississippi, 394 US 721 (1969); Terry v Ohio, 392 US 1,16-19 (1968); United States v Brignoni-Ponce, 422 US 873 (1975); United States v Mendenhall, 446 US 544, 552 (1980) (it should be observed that nowhere in the Fourth Amendment does one find the term "arrest"; the Fourth Amendment governs "seizures", including those of the person). This Court has made plain that encounters between citizens and police officers vary in kind and degree, and has

cautiously differentiated the attendant Fourth Amendment implications.

> The Fourth Amendment does not proscribe all contact between the police and citizens, but is designed "to prevent arbitrary and oppressive interference by law enforcement officials with the privacy and personal security of individuals". United States v Martinez-Fuerte, 428 U.S. 543,554 (1976)...As we have noted elsewhere, "Obviously, not all personal intercourse between policemen and citizens involves a 'seizure' of the person. Only when the officer by means of physical force or show of authority, has restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." Terry v Ohio, 392 U.S. 1,19, n. 16...
>
> Immigration and Naturalization Service v Delgado, __US__; 104 S Ct 1758 (1984).

A majority of this Court has adopted the "formula" proffered by Justice Stewart in Mendenhall and refined by Justice White in Royer as a standard by which police-citizen encounters may be assessed. Florida v Royer, 460 US at 498-501 (1983); I.N.S v Delgado, 104 S Ct at 1769.

While each case of course turns on its own facts, guidance for the bench and bar is necessary. This Court has recognized the need to establish demarcations of categories of police-citizen encounters to aid in the analytical inquiry. Three generic classes of police-citizen contact have evolved. First, a consensual encounter wherein an officer merely approaches an individual on the street or in another public place, asks him if he is willing to answer some questions, and puts the questions to the person if he is willing to answer. The person approached need not answer any questions put to him; indeed, he may decline to listen at all and may go on his way. Terry v Ohio, 392 US at 32-33; Florida v Royer, 460 US at 497-498. The individual may not be detained, even momentarily, without reasonable, objective grounds for doing so, and his refusal to listen or answer does not, without more, provide those

grounds. But "If there is no detention- no seizure within the meaning of the Fourth Amendment- then no constitutional rights have been infringed." Florida v Royer, 460 US at 499.

The second class permits the "limited intrusion of the personal security" of a person detained based on articulable suspicion not amounting to probable cause and justified by substantial law enforcement interests (e.g. investigative stops). Michigan v Summers, 452 US 692,699 (1981).

The third class is the time honored probable cause based arrest to hold the individual for a crime charged against him. Dunaway v New York, 442 US 200,207-9 (1979).

The Michigan Supreme Court, drawing from Royer, characterized these classes as "tiers", and adopted the analysis in its application to the instant case. The Michigan Supreme Court "passed" on (that

is, ruled upon) the application of the first tier. The majority found no application of the first tier to the instant facts. "Plainly, the police encounter with the defendant in this case was not at either the first or third tier of the Royer analysis." People v Shabaz, 424 Mich 42,58 (1985). The dissenting justices found that as a matter of law a forcible stop triggering the Fourth Amendment had not occurred:

> I would conclude that on this record there was not an intrusion on protected interests sufficient to constitute a stop. While the reasonable belief of an individual actually stopped by the police is relevant to whether a seizure has occurred, the threshold issue, whether there has been a "stop", is one of law. I would find on this record that one individual running after another is, as a matter of law, not a detention for investigation. 424 Mich 71.

It is submitted that the Shabaz dissent properly interprets the term "seizure", and that the application of that view to the facts demonstrates that

there was no infringement on the citizen's privacy or personal security so as to trigger the Fourth Amendment. It will be the position of the petitioner that a "seizure" of the person has occurred under the Fourth Amendment when either 1) an individual, who is innocent of any crime, would reasonably believe, due to an exercise of official authority or a show of force, that he is not free to go on his way with impunity, and acquiesces to the exercise of official authority or show of force, or 2) an individual is actually physically restrained by the exercise of physical force. In the instant case, neither occurred before the time respondent abandoned his weapon.

B. A Seizure Is A Seizure Is A Seizure:[1] One May Only Litigate That Which Happened To Him

Prior to Terry v Ohio, any restraint of a person amounting to a seizure for purposes of the Fourth Amendment was commonly understood to be invalid unless justified by probable cause. In establishing a limited exception to the rule, the Court in Terry recognized that not all personal interactions between the police and the citizenry constitute a "seizure". Terry v Ohio, 392 US at 19, n.16. This Court has subsequently refined the distinction drawn in Terry "that a person is 'seized' only when, by means of physical force or a show of authority, his freedom is restrained." United States v Mendenhall, 446 US at 554.

> We conclude that a person has been "seized" within the meaning of the Fourth Amendment only if, in view

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[1] Gertrude Stein from Sacred Emily, "Rose is a rose is a rose is a rose."

> of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of the circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating the compliance with the officer's request might be compelled. See Terry v Ohio, supra, 392 U.S. at 19, n.16, 88 S. Ct., at 1879, n.16; Dunaway v New York, 442 U,S. 200.297, and n.6, 99 S. Ct. 2248,2253, 60 L. Ed. 2d 824; 3 W. Lafave, Search and Seizure 53-55(1978). In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure (emphasis added).
>
> United States v Mendenhall, 446 US at 555.

A survey of the lead cases wherein a "seizure" is considered demonstrates that often the determination is "fact bound", turning heavily on assessments of credibility and the possibility of subtle influences from the circumstances, but only where the question involved is whether an individual who has refrained

from going on his way did so because of an objectively reasonable perception of an official exercise of authority or show of force. Whether the individual in fact refrained from going on his way (or was physically prevented from doing so), is not, however, ordinarily a subtle factual question, but, as indicated by Justice Boyle, readily ascertainable.

The seminal decision in recognizing a distinction, for Fourth Amendment purposes, between an encounter which constitutes an intrusion upon a constitutionally protected right and that permissible contact which does not impact upon security rights of the individual is, of course, Terry v Ohio. In Terry, a plainclothes police officer of thirty nine years experience observed what he believed to be criminal activity in the making. The officer observed the defendant in the company of two others for a period of time, then approached

him, identified himself as a police officer and asked the men for their names. "When the men 'mumbled something' in response to his inquiries, Officer McFadden grabbed the petitioner Terry, spun him around so that they were facing the other two, with Terry between McFadden and the others, and patted down the outside of his clothing." Terry v Ohio, 392 US at 7; United States v Mendenhall, 446 US at 553. The Terry Court "assume[d] that up to that point [before the officer had physically restrained Terry for the purpose of searching for weapons] no intrusion upon constitutionally protected rights had occurred." 392 US at 19 n. 16. This Court in Mendenhall, opined that this assumption was entirely correct. 446 US at 553.

Mendenhall also referred to Sibron v New York, 392 US 40 (1968), the companion case to Terry, wherein the Court did not

consider the issue of whether a "seizure" had occurred when a uniformed police officer approached the petitioner in a restaurant, told him to come outside, and he complied. The Sibron Court indicated the record "was barren of any indication whether Sibron accompanied [the Patrol man] outside in submission to a show of force or authority which left him no choice, or whether he went voluntarily in a spirit of apparent cooperation with the officer's investigation." Sibron v New York, 392 US at 63. Mendenhall notes that "Plainly, in the latter event, there was no seizure until the police officer in some way demonstrably curtailed Sibron's liberty" (emphasis added). United States v Mendenhall, 446 US at 554.

The task of distilling a working definition of "seizure", in reference to the Fourth Amendment proscription against unreasonable seizures of the person, was

undertaken by Justice Stewart, and although he failed to command a majority of Justices in the opinion, the standard he proferred is now embraced by a majority of this Court. Justices Stewart and Rehnquist concluded that a person is "seized only when, by means of physical force or a show of authority, his freedom of movement is restrained.... and if, in view of all the surrounding circumstances, a reasonable person would have believed that he was not free to leave." United States v Mendenhall, 446 US at 554-555. The facts as found by the Court did not support the finding that a "seizure" had taken place under this test, not because the individual did not in fact stay, but because that response was not viewed as compelled by any conduct of the officers.

Justice Stewart bifurcated the analysis of the facts, finding no "seizure" in the initial encounter, where

two federal drug agents approached a woman who arrived in Detroit from Los Angeles, identified themselves as federal agents, and asked to see her identification and airline ticket, upon which request she produced her driver's license and the ticket. He found a voluntary accompaniment; that is consent, in petitioner's trip to the DEA office after the agents discerned that different names were utilized, and inquired further of the defendant, specifically identifying themselves as federal narcotic agents, and the defendant became shaken and nervous. Thus, the search of defendant's person was not preceded by an impermissible seizure.

> On the facts of this case, no "seizure" of the respondent occurred. The events took place in the public concourse. The agents wore no uniforms and displayed no weapons. They did not summon the respondent to their presence, but instead approached her and identified themselves as federal agents. They requested, but did not demand to see the respondent's

> identification and ticket. Such conduct without more, did not amount to an intrusion upon any constitutionally protected interest. The respondent was not seized simply by reason of the fact that the agents approached her, asked her if she would show them her ticket and identification, and posed a few questions. Nor was it enough to establish a seizure that the person asking the questions was a law enforcement official.... In short, nothing in the record suggests that the respondent had any objective reason to believe that she was not free to end the conversation in the concourse and proceed on her way, and for that reason we conclude that the agent's initial approach to her was not a seizure.
>
> United States v Mendenhall, 446 US at 1877-1878

Justices Powell, Blackmun and Chief Justice Burger did not reach the contention that the encounter did not constitute a "seizure", finding that neither of the Courts below considered the issue; therefore, they proceeded on the assumption that a seizure had occurred and found it to be reasonable, thus concurring with the judgment. Justices White, Brennan, Marshall and

Stevens dissented, finding that the seizure issue was not raised below, and that the record developed below was inconclusive; further, that certain objective factors were improperly discounted. United States v Mendenhall, 446 US at 571.

In Florida v Royer, another case involving the reasonable perceptions of an individual in response to an encounter with government officials, this Court divided as to the application of a seizure standard to the facts; however, a fair reading of the opinion discerns a majority approach to the "seizure" standard. Justices White, Marshall, Powell, and Stevens employed the Mendenhall test to find that the facts in Royer demonstrated that "what had begun as a consensual inquiry in a public place had escalated" into a restraint under Terry. Florida v Royer, 460 US at 504, fn.9 [noting the consistency of the Royer

opinion with Mendenhall] and 508 [Justice Powell noting the factual distinction between Mendenhall and Royer, and finding in Royer a "lawful initial questioning"].

Justice Brennan, concurring in the result, found it unnecessary to reach the question of the legality of the initial stop; however, he did opine that the initial stop constituted a "seizure" due to the "show of authority and the restraint of Royer's liberty." 460 US at 512. Justice Blackmun, dissenting from the judgment that probable cause was required, specifically adopted the Mendenhall standard. Florida v Royer, 460 US at 515. Justices Rehnquist, O'Connor and Chief Justice Burger dissented from the judgment of the Court in finding that an arrest took place; however, they made reference with approval to the Mendenhall standard as it relates to the definition of a seizure. Florida v Royer, 460 US at 523.

It must be observed that in neither Royer nor Mendenhall was a restraint of liberty achieved by the application of physical force to the person of the individual--the question in each case, at least initially, involved official conduct and reasonable perceptions of that conduct by individuals who did not attempt to go on their way. In Royer, the plurality found the initial encounter, where the defendant was simply asked for identification, permissible, as involving no seizure; however, after the officers identified themselves as narcotics officers and told him of their suspicions and asked him to accompany them without having returned the tickets or identification, which he had surrendered upon request, or indicating that he was free to leave, Royer was effectively seized. 460 US at 500. The dissenting justices also found the initial encounter permissible, but found

that there existed reasonable suspicion to justify the further detention of the defendant. That detention did not constitute an arrest. 460 US at 523-526.

Justice Blackmun, in concurring with the plurality's adoption of the Mendenhall standard, began his analysis of the initial encounter by finding reasonable suspicion and characterizing the intrusion as short-lived and minimal. Florida v Royer, 460 US at 515,519. Justice Brennan found that when a police officer approaches an individual, identifies himself and asks the traveler for identification and his ticket, the individual has been "seized" for purposes of the Fourth Amendment. 460 US at 512.

In the airport stop genre of cases, this Court has recently reaffirmed the application of the Mendenhall-Royer standard of a "seizure". In a per curiam opinion, this Court held that certain constraints on personal liberty that

constitute a "seizure" for purposes of the Fourth Amendment are justifiable based on the lesser standard or articulable suspicion. Drawing from the Mendenhall standard, the Court in Florida v Rodriguez, recognized that an initial contact between officers and citizens, where the citizens were simply asked if they would listen to the officers questions, was clearly the type of consensual encounter that implicates no Fourth Amendment interest. Florida v Rodriguez, __US__; 105 S Ct 308; 83 LEd 2d 165 (1984).

In Reid v Georgia, 448 US 438 (1980) this Court reversed a lower court's determination of reasonableness and remanded the case to the state court, with Justices Rehnquist, Powell, Blackmun and Chief Justice Burger dissenting and expressing the belief that the police conduct did not implicate the Fourth Amendment. On remand, the Georgia court

found that no seizure had occurred when DEA agents approached individuals in an airport, identified themselves, asked them to cooperate in a drug investigation by permitting a pat-down search of their persons, and secured the individual's agreement to return to the terminal, at which point the defendant turned, fled and discarded a purse prior to his apprehension. The Court, relying on Mendenhall, found that the individual's freedom of movement had not been restrained by any physical force or show of authority. State v Reid, 247 Ga. 445, 276 S.E.2d 617, on remand, 158 Ga. App 570, 281 S.E.2d 650, cert. den., 454 U.S. 883, 102 S. Ct. 369, 70 L Ed2d 195 (1981).

In a different context, a factory survey setting, this Court, speaking through Justice Rehnquist, recently reaffirmed the Mendenhall-Royer standard for determining if the Fourth Amendment

is implicated by the mere questioning of a citizen by police officials. The Court addressed the element of the consensual nature of the encounter with reference to Brown v Texas, 443 US 47 (1979). The Court noted that while it is true that most people will respond to a question propounded by the police, this fact does not render the encounter any less consensual.

> Unless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded, one cannot say the questioning resulted in a detention under the Fourth Amendment. But if the person refuses to answer and the police take additional steps - such as those taken in Brown - to obtain an answer, then the Fourth Amendment imposes some minimal level of objective justification to validate the detention or seizure (citations omitted).
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> I.N.S. v Delgado, 104 S Ct at 1763

The Delgado Court found that the positioning of identifiable Immigration agents who wore badges, carried

walkie-talkies, and were armed, at the exits and on the premises of a private factory, and who approached employees and asked for identification, did not constitute a seizure of the work force, nor did the addressing of citizenship questions constitute a seizure of the person. The Court noted that though if any person had attempted to evade the questioning by attempting to leave the premises those persons might have been detained by the I.N.S. officials, no such claim was made as to the rights of the respondents before the Court, as the respondents answered the questions and went on their way. The Court also noted the mere fact that a person may have been questioned if he attempted to leave did not create a reasonable apprehension of detention or seizure. 104 S Ct at 1764. Justice Powell concurred in the opinion, noting that the question of whether a seizure had occurred turned on a

difficult characterization of fact and law. Justice Stevens joined the opinion of the Court, while Justices Brennan and Marshall dissented.

While noting that the majority of the Court had adopted the Mendenhall-Royer test, the dissent also opined that the rule does not look to the subjective impressions of the person questioned, but rather to the objective characteristics of the encounter which may suggest whether a reasonable person would believe he was free to walk away. I.N.S. v Delgado, 104 S Ct at 1769. The dissent found that there was a show of authority of a sufficient size and force to overbear the will of any person, and thus a seizure occurred.

From a survey of the cases from this Court one may discern a standard by which courts may adjudge whether the police-citizen encounter in question implicates the Fourth Amendment. In the majority of

cases an encounter of some sort has in fact occurred, and the courts are obliged to give legal character to the encounter. In the instant case, as noted by the dissenting Michigan justices, the factual predicate to a legal determination of the presence or absence of an appropriate level of cause - the existence of a stop or detention - is missing. The dissenting justices cogently argued that, as a matter of law, one individual running after another does not constitute a seizure under the text of the Fourth Amendment. People v Shabaz, 424 Mich at 71. Petitioner submits that in the absence of a show of authority or physical force, when police simply undertake to run after an individual who runs at the sight of police officers, no actual restraint of freedom of movement of that individual has occurred. A seizure is a detention. If there has been no detention, there has been no

seizure.

While it is true that there can be a brief encounter which is not a "seizure", it is not true that there can be a seizure without the loss of the freedom of locomotion, achieved against the will of the individual. Even if some exercise of official authority or show of force is made, such that a reasonable person would have believed that he is not free to leave with impunity, if the person chooses not to acquiesce, but to attempt to avoid the detention, then he is not seized until he is actually physically restrained. The issue of whether appropriate cause existed for the seizure is simply not subject to litigation unless and until a seizure occurs. If the individual acquiesces, he may complain; if he chooses not to acquiesce, but to attempt to avoid the detention, he may not litigate whether his seizure was justified until he was in fact physically

restrained. He cannot complain that during a period of flight he was illegally detained, or that he believed an illegal detention was imminent. Any action he undertakes in the interim, such as throwing a gun to the ground, is not subject to litigation, as the Fourth Amendment is not triggered until the seizure occurs. Any argument that if the individual would have acquiesced, the police would have detained him, and did not have cause, is speculative. As the Delgado Court held: individuals "may only litigate that which happened to them" (emphasis added). I.N.S. v Delgado, 104 S Ct 1765.

This Court in Delgado rejected a subjective notion of seizure by rejecting the claim that positioning agents by the door of a factory manifested an intent to detain such that a reasonable person would believe he would be detained if he did not give truthful answers to

otherwise proper questions put to him.

> Respondents argue, however, that the stationing of agents near the factory doors showed the INS's intent to prevent people from leaving. But there is nothing in the record indicating that this is what the agents actually did .... Likewise, the mere possibility that they would be questioned if they sought to leave the buildings should not have resulted in a reasonable apprehension by any of them that they would be seized or detained in any meaningful way.

This rule does not encourage police misconduct. The notion that the police will attempt to seize individuals without appropriate cause in the hope that they will flee, and while fleeing discard contraband or weapons, is beyond serious consideration. An individual who flees may only assert a Fourth Amendment right if caught; it makes no sense to allow him to raise a constitutional challenge or complain if he makes good his escape.

The standard submitted herein, then, is that a "seizure" of the person has occurred under the Fourth Amendment when

either 1) an individual, who is innocent of any crime, would reasonably believe, due to an exercise of official authority or a show of force, that he is not free to go on his way with impunity, and acquiesces to the exercise of official authority or show of force, or 2) an individual is actually physically restrained by the exercise of physical force. This standard has the analytical advantage of a "cause and effect" determination. If the police undertake to cause the restraint of an individual's freedom of movement, either by actual physical restraint or by the show of authority or show of force, and effect that restraint upon the freedom of movement, either by acquiescence to the exercise of authority or show of force, or by the application of physical force to the person of the individual, then a seizure has occurred, and the Fourth Amendment is triggered so as to require

an appropriate showing of cause. But if there is no effect - no deprivation of the freedom of locomotion - there is no basis to examine for causes and justifications.

C. Lower Court Dispositions

Several state court opinions warrant inspection, as, in petitioner's view, they represent, along with the opinion of the majority of the Michigan Supreme Court, a misapprehension of the term "seizure". The Louisiana Supreme Court found an impermissible seizure when police officers, having observed an unknown woman exiting a known narcotics address, pulled along side her, observed her place something in her waistband, turn, walk back toward the address, prompting the officers to "spring" from their car and overtake her as she was withdrawing glassine envelopes containing heroin. The Court found that the

officers could not approach the individual under conditions where a detention is imminent without reasonable suspicion or probable cause. Three Justices dissented, one finding the facts amounted to probable cause, one finding reasonable suspicion, and the final Justice finding that no "stop" occurred. "To turn and flee simply because she saw the police car approaching is not due to police action. This conduct, instead, is a spontaneous manifestation of guilt." State v Saia, 302 So 2d 869,877 (1974). Petitioner submits that this latter view affords the proper analysis.

The Massachusetts Supreme Court has found that a pursuit designed to effect a stop is impermissible under the Fourth Amendment, absent appropriate cause, holding that the stop starts when the pursuit begins. The Court noted that the pursuit of the bicycle rider in that case was conducted by several police cars,

marked and unmarked, with sirens blaring, and the stop was effected by the officers reaching from the car, grabbing the defendant from his bike, and throwing the defendant across the hood of the cruiser, whereupon two manila envelopes containing controlled substances were discovered. The Court failed to note that the police conduct in that case did not precipitate the flight, and that the individual's freedom of movement was not infringed upon until such time as the act of grabbing the defendant took place, at which time the contraband was discovered. There was no need to discuss the legal effect of the "pursuit", and consistent with the previous analysis it is here submitted that the dicta in the opinion is without a sound foundation in law.

D. The Instant Case

The instant case does not implicate the ultimate component of the proposed

seizure standard, as prior to the abandonment of the weapon, no restraint on respondent's freedom of movement had been accomplished, whatever the desires of the police or the perceptions of the respondent. There was no effect; thus, there is no need to examine for causes or justifications. Moreover, in this case the first component of the standard was not met, as the officers did not exercise any show of official authority or force, nor did they physically restrain respondent by the application of physical force to his person (before the gun was abandoned). The officers were in plainclothes, in an unmarked standard police vehicle. No questions or commands were issued by the officers, nor did they have the opportunity to provide the respondent with any identification. The police, by their conduct, did not cause any restraint upon the respondent's freedom of movement. Moreover, the respondent

did not manifest a reasonable belief that he was not free to walk or run away, nor acquiesce to any perceived police conduct. The respondent broke into a run, attempting to elude the police, though the police had done nothing to trigger the flight. The majority opinion of the Michigan Supreme Court runs afoul of the Delgado teaching by engaging in the speculative analysis that "If he [the respondent] stopped running, he would not have been free to leave. Events proved that." People v Shabaz, 424 Mich at 66. Such an observation in fact argues that until respondent stopped running he was in fact free to leave (was not detained), and he did exactly that "at flank speed". The facts in the instant case are not "so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded". I.N.S. v Delgado, 104 S Ct at 1763. The dissent

in the Michigan Supreme Court properly found "that the respondent's flight prevented any request for an explanation of [the respondent's] behavior"; therefore, there was not even a "stop" or "forcible stop" so as to trigger the Fourth Amendment.

The facts in this case demonstrate that there was no infringement of a citizen's right to walk away, nor any restraint upon the liberty of a citizen, by the official show of authority or physical force. The abandonment of the gun by respondent and its recovery by the police thus raises no question under the Fourth Amendment.

E. "Anticipatory Abandonment"

The Michigan Supreme Court held that the respondent's abandonment of the bag [containing the gun] was in direct response to an anticipated unjustifiable seizure (note that it will be argued

subsequently that the police did have a reasonable suspicion under the facts of this case, so that a stop was justified). People v Shabaz, 424 Mich at 66. The Court did not discern a difference between the seizure of the person and a possible subsequent search. Consistent with the petitioner's approach that a seizure does not occur until there is a restraint of movement, it is submitted that the search, the conduct attributable to the police from which the disclosure of evidence springs, does not occur until the seizure is effected and the search takes place. It is an unwarranted extrapolation of logic to assume that an individual, who has run at the sight of police officers, reasonably believes that the pursuit constitutes an illegal seizure, which will precipitate an illegal search of the person as well. Properly viewed, there is no such thing as an "anticipatory abandonment".

The Florida Supreme Court made this factual and legal distinction in a case wherein it was found that the initial stop was without justification; however, the act of abandonment was not a product of the illegal stop.

> Fundamental Fourth Amendment interests as well as sound logic support the prevailing case law in this subject. Until the actual police search has begun, it cannot be assumed that the police will search a person whom they have temporarily stopped on the street or that they will search such a person's car or other personal belongings. Not every temporary detention necessitates such action.... As a consequence, a person's abandonment of the property subsequent to an illegal police stop can hardly be considered the product of the stop.
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> State v Oliver, 368 So.2d 1331 (Fla. App. 1979).

Consistent with the Florida approach, the Eleventh Circuit has found a voluntary abandonment in the face of allegedly improper police activity by employing a cause and effect analysis. In rejecting the factual claim that the

defendant had abandoned suitcases in a backyard in light of an illegal police entry and search of his home, the Court noted the abandonment took place prior to the entry. The Court continued on to find that whatever illegality may have resulted from the search and seizure of the bags was attenuated by the voluntary abandonment. United States v Pirolli, 673 F 2d 1200,1204 (CA 11, 1982). [citing United States v Colbert, 474 F 2d 174 (CA 5, 1973), recognizing that the illegality of an illegal stop or arrest may be attenuated by a voluntary abandonment.]. As noted previously, this rule does not invite police misconduct in this context, as the notion that the police will attempt to seize individuals without appropriate cause in the hope that they will flee, and while fleeing discard contraband or weapons, is beyond serious consideration. An individual may only assert a Fourth Amendment right if seized

and searched. Respondent here chose to relinquish his expectation of privacy in the bag containing the gun, and it was properly recovered by the police. See 1 LaFave, Search and Seizure, Sec. 2.6, pp. 366-368; City of St. Paul v Vaughn, 237 NW 2d 365 (1975); United States v Kendall, 655 F 2d 199 (CA 9, 1981), cert den 455 US 941.

ARGUMENT TWO

ASSUMING ARGUENDO THAT THE PURSUIT OF AN INDIVIDUAL BY AN UNDERCOVER OFFICER, WITHOUT MORE, CONSTITUTES A SEIZURE, INDEPENDENT OF AN ACTUAL PHYSICAL RESTRAINT, THE FLIGHT OF THE RESPONDENT AFTER LEAVING A BUILDING AT WHICH NARCOTIC AND WEAPONS OFFENSE ARRESTS HAD PREVIOUSLY BEEN MADE, AND AFTER ATTEMPTING TO HIDE A PAPER BAG IN HIS VEST OR PANTS UPON THE OBSERVATION OF AN UNMARKED POLICE CAR, CONSTITUTED REASONABLE SUSPICION FOR AN INVESTIGATIVE DETENTION.

Reasonableness is the touchstone of Fourth Amendment analysis, and the scope of a particular intrusion by agents of the public upon the personal security of individuals is a central element of the reasonableness analysis. In the creation of the Terry class of "seizure", a balance was struck between the minimal nature of the intrusion upon the privacy rights of the individual and the governmental interest in preventing criminal activity. Reasonable suspicion of criminal activity warrants a temporary

detention for purposes of questioning limited to the purpose of the stop. United States v Brignoni-Ponce, 422 US 873, 881-2 (1975); Florida v Royer, 460 US at 499.

In balancing the interests, the Royer Court dispelled any doubt that the public's interest in the suppression of illegal drug transactions or other serious crimes is a weighty concern which will warrant a temporary detention. 460 US at 500. The Shabaz dissent made reference to the equally serious governmental interest in the prevention of violence due to unlawful use of handguns. "A pursuit in the attempt to stop to ascertain whether or not a weapon is being concealed is a minuscule intrusion when weighed against the havoc caused by weapons." People v Shabaz, 424 Mich at 72.

In justifying the minimally intrusive Terry stop, the officer must have an

objective justification or reasonable suspicion that an individual is involved in criminal activity. Brown v Texas, 443 US at 51; Terry v Ohio, 392 US at 21. The reasonable suspicion is an aggregate of specific articulable facts, together with rational inferences from those facts. United States v Brignoni-Ponce, 422 US at 884.

> Courts have used a variety of terms to capture the elusive concept of what cause is sufficient to authorize police to stop a person. Terms like "articulable reason" and "founded suspicion" are not self-defining; they fall short of providing clear guidance of the myriad factual situations that arise. But the essence of all that has been written is that the totality of circumstances - the whole picture - must be taken into account. Based upon the whole picture, the detaining officer must have a particularized and objective basis for suspecting the particular person stopped of criminal activity. [cites ommitted]
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> The idea that the assessment of the whole picture must yield a particularized suspicion contains two elements, each of which must be present before a stop is permissible. First, the assessment must be based upon all the circum-

> stances. The analysis proceeds with various objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers. From these data, a trained officer draws inferences and makes deductions-inferences and deductions that might well elude an untrained person.
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> United States v Cortez, 449 US 411,417 (1981).

In the assessment of the whole picture, each circumstance, and the reasonable inferences drawn therefrom, is scrutinized. It is submitted that just as in a probable cause determination, the laminated total which evolves may well be stronger than simply the sum of the layers. See generally United States v Lewis, 556 F 2d 385 (CA 6, 1977); United States v Ashcroft, 607 F 2d 1167, 1171 (CA 5, 1979).

A. Trained Law Enforcement Officer Deduction

In assessing those factors articulated in support of the reasonable suspicion

courts recognize that trained law enforcement officers may well be "able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer". Brown v Texas, 443 US at 52, n.2; United States v Mendenhall, 446 US at 564-5; United States v Cortez, 449 US at 417. In the instant case, the eleven year veteran officer articulated the factors which in his mind, and based on his experience, lead him reasonably to believe that a weapon or narcotics was being secreted by the respondent. The majority opinion did not credit the experience of the officer; whereas the dissent in its assessment of the whole picture credited the experience of the officer and noted the trial court's determination that the officer was "highly credible". People v Shabaz, 424 Mich at 75. The officer's experience is a factor in the assessment of the whole picture.

B. Nature and Character of the Area

This Court has observed on more than one occasion that a police officer may take into account the nature and character of a particular area in his assessment of the whole picture. United States v Brignoni-Ponce, 422 US at 884-5; United States v Mendenhall, 446 US at 564-5.

C. Flight or Evasive Conduct

This Court has recognized that flight and deliberately furtive actions at the approach of strangers or law enforcement officers yields "a strong indicia of mens rea" which, when coupled with specific knowledge relating to a high crime area [and a specific incidence of specific crimes], may be factored into a reasonable suspicion of criminal activity, or indeed a probable cause assessment. Sibron v New York, 392 US at 66; United States v Sharpe, __ US __; 105 S Ct 1568;

84 L Ed 2d 605 (1985); United States v Green, 670 F 2d 1148,1152 (DC. CA, 1981); United States v Brignoni-Ponce, 422 US at 885.

It should be observed that the Shabaz majority opinion is internally inconsistent. First, the court found the pursuit to be an obtrusive police confrontation with the respondent, and therefore no abandonment in the throw of the bag containing the gun, as respondent could reasonably have feared an imminent unlawful detention. But then the court found a lack of reasonable suspicion for a stop because the respondent could not have been attributed with the knowledge that the three unknown persons in a "private" motor vehicle were in fact police, so that his conduct in running at the sight of them might be regarded as suspicious! Petitioner leaves for another day and another case, the question of suspicion arising from flight

alone at the approach of undercover police officers. The instant case is not limited to a single factor assessment.

D. Act of Concealment

A furtive gesture or gestures, including the act of concealment, and reasonable inferences which may be drawn therefrom by an experienced officer, is a factor which may be taken into account by an officer in justifying his belief that he is observing criminal activity. Sibron v New York, 392 US at 66; United States v Green, 670 F 2d 1149,1152 (CA DC, 1981).

E. Conclusion

The Michigan Supreme Court majority erred in failing to find a reasonable suspicion in this case (assuming arguendo that any cause was necessary, a point argued in Issue I above). The failing of the court is demonstrated by its failure to consider the "whole picture", instead

examining each fact known to the officers in isolation rather than in conjunction with each other. Viewing the facts together, taking the "whole picture"--the experience of the officers, the nature of the area and past criminal conduct there, the furtive hiding gesture of the respondent, and respondent's flight at the sight of the officers--it must be said that a reasonable officer would have been derelict in the performance of his duties if he had not undertaken to inquire regarding the cause of this conduct. A forcible stop was thus justified.

CONCLUSION

Wherefore, petitioner concludes that this Court should reverse the Michigan Supreme Court, hold that the gun recovered by the police from respondent may be admitted into evidence at trial consistent with the Constitution, and remand for proceedings not inconsistent with this Court's opinion.

Respectfully submitted,

JOHN D. O'HAIR
Prosecuting Attorney
County of Wayne

TIMOTHY A. BAUGHMAN
Chief of the Criminal Division
Research, Training and Appeals

Andrea L. Solak

ANDREA L. SOLAK P-25217
Principal Attorney, Appeals
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5794

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ALS/dh